

**STATE OF WISCONSIN
Department of Commerce**

In the Matter of the PECFA Appeal of

Harbhej Singh
Sun Enterprises Corp
401 E Main St
Avoca WI 53506

PECFA Claim #53182-1719-45
Hearing #04-191

Final Decision

PRELIMINARY RECITALS

Pursuant to a petition for hearing dated July 26, 2004, under Wis. Stat. §§'s 227.44 and 27.46(3)(a), and COMM 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce, a hearing was held in the above-entitled matter on February 10, 2005, at Madison, Wisconsin.

The issue for determination is: **Whether the department's decision dated July 12, 2004 was correct with regard to the disputed costs identified in petitioner's appeal received by the Department August 1, 2004.**

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Harbhej Singh
Sun Enterprises Corp
401 E Main St
Avoca WI 53506

Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: Joseph R. Thomas
Assistant Legal Counsel
Department of Commerce
201 W. Washington Ave.
PO Box 7838
Madison, WI 53707-7838

The authority to issue a final decision in this matter has been delegated to the undersigned by order of then Secretary Cory L. Nettles dated January 10, 2005.

This matter was conducted, pursuant to written notice provided to the parties, as an expedited hearing before Steven Wickland, administrative law judge (ALJ) presiding. Harbhej Singh, president of Sun Enterprises Corp., testified by telephone, and participated in all aspects of the hearing by teleconference. Department of Commerce (Department) staff Dennis Legler, with the PECFA program, provided testimony on the issue.

The matter now being ready for decision, I hereby issue the following:

FINDINGS OF FACT

1. Sun Enterprises Corp owns a site at 1645 Main Street, Union Grove, Wisconsin, (BRRTS # 13-520153238, FID#: 252060270). The appellant submitted its claim for reimbursement of the costs it incurred in the remediation of the petroleum-contaminated site in the amount of \$134,692.37. The total dollars reviewed were \$136,043.53.
2. The Department administers the petroleum environmental cleanup fund program (PECFA). The Department made a total PECFA payment to appellant of \$122,396.76 (an amount arrived after subtracting deductibles and non-eligibles) on June 22, 2004. By its July 12, 2004 letter entitled Breakdown of PECFA Costs (Respondent Exhibit 1), the Department denied as ineligible \$ 6,146.77. (Legler testimony and Resp. Ex. 1.)
3. The appellant submitted an appeal dated July 26, 2004 received by the Department on August 1, 2004. The claim seeks: \$1,786.00 denied for subconsultant fees for replacement of monitoring wells; \$2,313.82 for consulting fees considered to be a cap exceedance; and \$795.79 of interest denied because the claim submitted was beyond 120 days from conditional closure. (Singh letter, page 1 of 2.)
4. Dennis Legler, Department PECFA program, testified on behalf of the Department. He is section chief for the PECFA claim review program and oversees the claim auditors in applying current laws and administrative rules to claims. He served as a claim reviewer himself from 1992 to 1998. In September 2000, he became section chief. The claim process includes review of reports, source of release from eligible tank system, and application of administrative rules on eligible and ineligible costs to claims, which are quite specific. Legler worked with the Department claim reviewer Russell Haupt, who made the claim reimbursement decision herein, and Legler concurred with the staff reviewer's conclusion.
5. At issue are three amounts that were denied as ineligible, totaling \$4,895.61.

6. Department reasons for specific denials. Resp. Exhibit 1 includes as an attachment a six-page document category report (Report) detailing Department reasons for specific denials. Report at page 4 determines that \$1,786.00 is non-eligible, stating “Duplication of effort – Comm 47.30. Replacement of wells screened too deep.” (Resp. Ex 1 at 4.) Department policy is to deny reimbursement of work that was ineffective and had to be redone. \$2,213.82 was denied because that amount is an exceedance of the reimbursement cap established in Wis. Adm. Code Comm §§’s 47.335, 47.337, 47.338 and 47.339. (Resp. Ex. 1 at 5 and Legler testimony.) Section 47.339 provides for an \$80,000 reimbursement maximum, as indicated by appellant’s consulting firm, noting that they could do the work for under \$80,000. (Testimony of Dennis Legler, and consultant letter, April 13, 1999. Resp. Ex. 9.) The \$795.79 interest amount was denied because: “\$795 interest for non-eligible costs (\$252.22) Interest from March 15, 2004 to April 19, 2004. \$543.57. See notes to claimant.” (Resp. Ex. 1 at 5.) The \$252.22 denial was interest associated with the non-eligible costs previously denied (wells and exceeding the cap). The \$543.57 is interest that accrued after the March 15, 2004 (or 60-day portion of the) deadline, based on the 120-day provision in the statute. The Department added three days (for mailing time) to the DNR January 14, 2004 closure letter. The 120 days is calculated as of 120 days from the January 18, 2004 date of the Department of Natural Resources’ (DNR) closure letter. Thus, the deadline date for filing a claim with the Department is (no later than) May 16, 2004.
7. The January 14, 2004 DNR closure letter to Harbhej Singh advises that no further work is required at the site, stating: “The Wisconsin Department of Commerce...has reviewed the request for case closure prepared by your consultant, Kapur & Associates, Inc. It is understood that residual soil and groundwater contamination remains on-site. Commerce has determined that this site does not pose a significant threat to the environment or human health. No further investigation or remedial action is necessary.” (Resp. Ex. 2) (Emphasis in original.) The DNR closure letter further refers to the need to timely file any claim within 120 days to maintain any claim for interest costs: “This letter serves as your written notice of ‘no further action.’ Timely filing of your final PECFA claim (if applicable) is encouraged. If your claim is not received within 120 days of the date of this letter, interest costs incurred after 60 days of the date of this letter will not be eligible for PECFA reimbursement.” (Resp. Ex. 2.)
8. The Department sends the Department’s PECFA updates to every registered engineering consultant firm in the state, to interpret state statutes and administrative rules. PECFA Update #16 dated September 2001 explained the 120-day provision for interest reimbursement and how the Department would interpret that provision. (Resp. Ex. 4, and Legler testimony.) Legler testified that the consultant in this case was on the Department’s registration during the time period concerned here, and said that the updates are also available on the Department’s website.
9. Appellant’s consultant, Kapur & Associates, Inc. (K&A) submitted its claim for reimbursement of costs by its letter of May 14, 2004. (Resp. Ex. 5.) The attachment to that letter, “Form 1 / Remedial Action Fund Application,” bears a stamped received date by the Department of May 20, 2004. (Resp. Ex. 5 at page 2.) This date is more than 120 days after the date of the January 14, 2004 letter, even if considered to have been mailed on January 18, 2004, as the time period is 123 days.

10. Resp. Ex. 6 is a screen print of a document in the Department's database, and is essentially a tracker, with information entered by the Department claim reviewer. Exhibit 6 shows a Department determination that \$1,786.00 (of a total consultant reimbursement request of \$2,014.34) is ineligible because: "Duplication of effort-Comm 47.30. Replacement of wells screened too deep." Legler noted that the original work was ineffective, so had to be redone. Here, the technical oversight person, be with DNR or the Department, likely found a lack of proper depth prevented the collection of proper data. In such cases, the Department typically takes away the cost for the ineffective wells, and pays for the next, effective effort, here wells placed at the correct depth. (Legler testimony.) The Department, in denying the well cost applied Comm § 47.30(2)(a)15 and 47.30(2)(b)2. (Resp. Ex. 8 indicates that of the \$2,007.08 claim was paid.)
11. K&A's April 13, 1999 letter (Resp. Ex. 9) advised the Department that they could perform the remedial actions for under \$80,000. K&A exceeded this amount (Legler testimony). The consultant requested additional funding; the Department extended additional funding of approximately \$10,400 but K&A was unable to complete the remediation project within that additional funding amount.
12. Appellant exceeded the cap by approximately \$4,000 (for the duplication of wells and other remediation expenses.) The \$1786 could have been denied for either of two reasons: duplication of effort or cap exceedance. Legler stated that the Department denied that expense for the first reason, duplication of effort.
13. The Department denied the K&A request for additional funds (beyond the \$10,400).
14. Legler testified that the Department's decision on non-eligible costs was proper.
15. Mr. Singh asked no questions of witness Legler. Mr. Singh provided no witnesses and offered no testimony himself, although offered that opportunity during the hearing.
16. Respondent exhibits 1 through 9 were offered into evidence. There were no objections to do so. Those exhibits were admitted into evidence.

APPLICABLE STATUTES AND CODE PROVISIONS

Wisconsin Stats. §101.143(3)(f) provides, in part, as follows:

Application. A claimant shall submit a claim on a form provided by the department. The claim shall contain all of the following documentation of activities, plans and expenditures associated with the eligible costs incurred because of a petroleum product discharge from a petroleum product storage system:

Wisconsin Stat. §101.143(4)(c) provides, in part, as follows:

Exclusions from eligible costs. Eligible costs for an award under par. (a) does not include the following:

3. Other costs that the department determines to be associated with, but not integral to, the eligible costs incurred because of a petroleum products discharge from a petroleum products discharge system or home oil tank system.

Wisconsin Stat. §101.143(4)(cc) provides, in part, as follows:

(cc) Ineligibility for interest reimbursement. 1.a. Except as provided in subd. 1m or 2., if an applicant's final claim is submitted more than 120 days after receiving written notification that no further remedial action is necessary with respect to the discharge, interest costs incurred by the applicant after the 60th day after receiving that notification are not eligible costs.

Wisconsin Admin. Code COMM 47.30(2) provides, in part, as follows:

(2) EXCLUSIONS FROM ELIGIBLE COSTS. The department has identified various costs determined to be ineligible for reimbursement. Section 101.143, Stats., lists specific cost items which may not be reimbursable under the PECFA program. In order to control costs and provide awards for the most cost-effective remediations of petroleum-contaminated sites within the scope of this chapter, the following costs may not be reimbursed:

(a) Costs determined to be unrelated to remedial activities under the scope of this chapter:

(15) Other costs that the department determines to be associated with, but not integral to, the remediation of a petroleum product discharge from a petroleum product storage system or home oil tank system.

(b) Costs related to improper or incompetent remedial activities and services:

2. Costs of redoing remedial action activities or remedial action work which was incomplete or incompetent.

Comm 47.339. Cost effective remediations.

(2) Notification and requirements. The \$80,000 limit shall not be exceeded without prior notice to and approval from the department. If any expenses above the \$80,000 limit are incurred...without department approval, they will be the sole responsibility of the consultant and cannot be claimed for reimbursement under the PECFA fund.

DISCUSSION

Consultant charges for replacement of monitoring wells

The Department denied reimbursement of the cost of replacement monitoring wells for the reason set out above. The exhibits and the testimony of Dennis Legler establish that the wells were originally improperly placed or installed, such that the \$1,786.00 for that task constituted an ineligible, duplicative cost within the context of Comm 47.30. The denial was proper for that reason.

Consulting fees over \$80,000 were a cap exceedance

The Department's testimony and supporting exhibits establish that the \$80,000 limit was exceeded; that additional funding allowed was also exceeded; and that the Department denied a further request for addition funding. Because the \$2,213.82 was an expense beyond the limit allowed by Department rule (even after additional funding was allowed), denial of reimbursement was proper.

Interest amounts denied based on the 120-day statutory provision

Wisconsin Stat. §101.143(4)(cc), Ineligibility for interest reimbursement provides, with exceptions that don't apply here, that "if an applicant's final claim is submitted more than 120 days after receiving written notification that no further remedial action is necessary with respect to the discharge, interest costs incurred by the applicant after the 60th day after receiving that notification are not eligible costs.

The January 14, 2004 DNR closure letter states that, in fact, no further remedial action is necessary. In order for appellant to have certain interest charges eligible for reimbursement, that K&A claim should have been filed with 120 days, or, no later than May 16, 2004. As the K&A letter (i.e., attachment thereto) is date-stamped received by the Department on May 20, 2004, the letter was filed beyond the 120-day period. Therefore, the interest incurred by the appellant during the relevant statutory period are ineligible and therefore the interest amount of \$795.79 was properly denied. Wis. Stat. § 101.143(4)(cc) is clear in requiring that the 120-day period be met, and it was not met in this case.

CONCLUSIONS OF LAW

The appellant was an owner of a property covered by the remedial provisions of Wis. Stat. § 101.143.

The Department properly applied Wis. Admin. Code Comm sec. 47.30 in denying reimbursement of the \$1,786.00, as the funds expended on the additional well task constituted an ineligible, duplicative cost within the context of Comm 47.30.

In exceeding the \$80,000 limit (and additional funding limit), the spending cap of Comm 47.339 was exceeded, making the \$2,213.82 expense beyond the limit allowed by Department rule.

The DNR closure letter (Resp. Ex. 2), by stating that no further remedial action is necessary at the site, did, on January 14, 2004 begin the statutory 120-day period of Wis. Stat. § 101.143(4)(cc) running. The 120-day period concluded before the receipt date by the Department of the appellant's claim. Therefore, interest costs incurred by the appellant after the 60th day after receiving the DNR closure letter are ineligible for reimbursement.

Wisconsin Stat. § 101.143(4)(cc).

DECISION

The Department's decision to deny the amounts appealed herein is affirmed.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send or deliver a written request to Rehearing Request, Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970. Rehearing requests may also be filed by fax at the following number: (608) 266-3447. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

Send or fax a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: _____

Steven Wickland
Administrative Law Judge
Wisconsin Department of Commerce
PO Box 7838
Madison WI 53707-7838

copies to:

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Avoca WI 53506

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Date Mailed: _____

Mailed By: _____